

The Calamitous Law of Notes

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The law of negotiable instruments is hemmed in on one side by its own antiquity and on the other by the emergence of electronic communications. These factors generally place negotiable instruments law under a great deal of pressure. While most of that pressure is directed at payments law and, thus, focuses on the provisions of negotiable instruments law that govern checks, the law of notes is quite problematic as well. This article analyzes the calamity that is the current law of notes, focusing on eight problematic aspects. As the article demonstrates, that body of law is weighty, but of ever-decreasing relevance; moreover, when relevant, it governs in questionable ways.

I. INTRODUCTION

The current law of payment systems is a mess. That is hardly a novel or controversial statement. Articles 3 and 4 of the Uniform Commercial Code (UCC), even as modernized by the 1990 and 2002 revisions, still reflect a museum of the payment mechanisms of the late eighteenth century more than they reflect today's economy. While an attempt was made in the 1980s to rectify this situation with the New Payments Code, the problem is deeper and older than that. By the 1940s and 1950s, it should have been seen that the odd collection of doctrines contained in Articles 3 and 4 (effectuating the assignability of an independent covenant to pay money, protection of the property rights of certain good faith purchasers, force-fed adaptation of the ancient law of drafts to modern payments by check, etc.) had either outlived their usefulness or were only subtopics of a larger theme. Whereas Grant Gilmore took a similar situation and used it to reformulate the law of secured transactions, the drafters of Articles 3 and 4 merely gussied up the antiquities. The result is much like the panda's thumb, a reasonably functional mechanism made up of spare parts designed for other purposes. We could have done better a half-century ago, and we need to do better now.

Much attention has been paid in the last few decades to Articles 3 and 4 of the UCC as part of current developments in the emerging law of payment systems including checks, but comparatively little attention has been given to UCC Article 3 insofar as it establishes the law of notes. In many ways, the law of notes¹ as embodied in UCC Article 3 is scarcely different than the

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¹ Article 3 contains rules governing all negotiable instruments, both notes and drafts (the latter, of course, including checks). This grouping, while consistent with legal

doctrines developed by Lord Mansfield and his fellow travelers in the late 18th century.² The worlds of finance and commerce have changed dramatically in the intervening centuries, but the law of notes has been largely constant. This phenomenon—changing commercial practices governed by unchanging law—is the recipe for a commercial calamity. There are at least eight aspects of the law of notes, as applied to our current credit economy, that are problematic. This article briefly surveys these difficulties.

II. A LOT OF LAW, BUT NOT MANY NOTES

Article 3 of the UCC consists of 68 sections, all but seven of which apply to notes.³ The Article contains a total of 76,071 words (including the Official Comments).⁴ This is a hefty piece of law. By way of comparison, the Declaration of Independence contains 1325 words; the Constitution (including amendments) contains 7591 words; the Universal Declaration of Human Rights contains 1778 words; and the Emancipation Proclamation contains 725 words.⁵ Even in the context of the UCC, Article 3 is no lightweight. It is longer, for example, than Article 2, which contains only 72,317 words,⁶ Article 5, which contains only 22,375 words, and Article 8, which contains only 70,195 words. Yet each of those Articles contains much more of commercial significance than Article 3. Article 3 is exceeded in length only by the 900 pound gorilla of the UCC—Article 9—which contains 181,886 words.

history, does not necessarily match modern commercial realities. The focus of this article is the law that governs notes. While the governing statute, as it stands, applies many of the same rules to drafts as it does to notes, the critiques in this article are directed to those rules only as they apply to notes. To make that point clear, this article frequently refers to the “law of notes” even though many of its principles apply identically to checks and other drafts.

² As suggested by Ed Rubin and others, Lord Mansfield’s role may have been more of a clarifier and communicator than an originator of these doctrines. See Edward L. Rubin, *Learning from Lord Mansfield: Toward a Transferability Law for Modern Commercial Practice*, 31 IDAHO L. REV. 775, 778–80 (1995).

³ The sections that do not apply to notes are: U.C.C. §§ 3-312 (Lost, Destroyed, or Stolen Cashier’s Check, Teller’s Check, or Certified Check); 3-408 (Drawee Not Liable on Unaccepted Draft); 3-409 (Acceptance of Draft; Certified Check); 3-410 (Acceptance Varying Draft); 3-411 (Refusal to Pay Cashier’s Checks, Teller’s Checks, and Certified Checks); 3-413 (Obligation of Acceptor); and 3-414 (Obligation of Drawer).

⁴ This word count is based on the 1990 Official Text. The number of words is slightly higher in the 2002 Official Text.

⁵ By way of further comparison, the Gettysburg Address (albeit not a legal document) contains only 278 words.

⁶ All word tallies for Articles of the UCC include the Official Comments.

One would think that as lengthy a statute as Article 3 would govern numerous transactions constituting an important segment of the economy. Yet, as Ronald Mann and others have shown us, that belief would be incorrect. Rather, a search for notes governed in any meaningful way by Article 3 is a search for a very few needles in a very large number of haystacks.

As noted by Ronald Mann,⁷ who examined the major commercial contexts in which it is frequently assumed that notes governed by Article 3 predominate, very few documents thought of as notes actually constitute notes that are governed by Article 3. This is because they do not satisfy the technical criteria for negotiability contained in UCC Section 3-104 and related sections.

For example, Mann pointed out that most home mortgage “notes” are not negotiable instruments under the criteria of UCC Section 3-104 and, thus, are not “notes.” As Mann noted, mortgage notes that follow the standard FNMA/FHLMC multi-state form contain a non-monetary undertaking that disqualifies them from negotiable status under UCC Section 3-104(a)(3).⁸

Notes representing private commercial obligations similarly did not qualify as negotiable instruments—Mann examined a number of form promissory notes utilized by commercial lending institutions and concluded that “none of these promissory notes were [sic] unquestionably negotiable.”⁹ He reached similar conclusions with respect to publicly traded commercial obligations as well.¹⁰

It is possible that many promissory notes for consumer purchases of goods or services fulfill the criteria of negotiability, but this conclusion must be accompanied by a very large caveat. Most such promissory notes will qualify as either a “consumer credit contract”¹¹ or “purchase money loan”¹² under the Federal Trade Commission’s Holder in Due Course Regulations¹³ and, therefore, must contain legend mandated by those rules. The legend mandated for consumer credit contracts states:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS
SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR
COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES

⁷ See Ronald J. Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 UCLA L. REV. 951, 962–85 (1997).

⁸ *Id.* at 970.

⁹ *Id.* at 976.

¹⁰ See *id.* at 978.

¹¹ See 16 C.F.R. § 433.1(i) (2006).

¹² See *id.* § 433.1(d).

¹³ *Id.* § 433.

OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS. HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.¹⁴

The legend mandated for purchase money loans is identical except for the deletion of the words “pursuant hereto or.”¹⁵

Under Article 3 as it was in effect at the time of promulgation of the FTC regulations, either legend would have deprived a promissory note containing it of negotiability inasmuch as it would have had the effect of transforming the maker’s obligation to pay money into a conditional obligation (conditional on lack of defenses) rather than an unconditional obligation.¹⁶ The 1990 revisions to Article 3 restored negotiability to promissory notes containing the FTC legend, but did so with an important twist. UCC Section 3-106(d) provides:

If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of Section 3-104(a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.¹⁷

Thus, while the presence of the FTC legend does not keep a consumer promissory note from qualifying as a note governed by UCC Article 3, that governance is bowdlerized by the fact that the most important aspect of negotiability—the rules flowing from holder in due course status—do not apply to these notes.

In light of the fact that so few documents that we think of as notes are actually governed by Article 3, it would appear that the Article, insofar as it applies to notes, erects a massive infrastructure for which there are very few users. It would be hard to conclude that the costs of that infrastructure are justified by its minimal benefits. Rather, Article 3, at least as applied to notes, may be the commercial law equivalent of the Alaskan “Bridge to Nowhere.”¹⁸ Of course, unlike the Bridge to Nowhere, we already have the

¹⁴ *Id.* § 433.2.

¹⁵ *Id.*

¹⁶ See U.C.C. § 3-104(1)(b) (1989).

¹⁷ U.C.C. § 3-106(d) (2003).

¹⁸ The proposed \$315 million Gravina Island Bridge would connect Ketchikan, Alaska (population 8000) to Gravina Island (population 50), at a cost of \$223 million, or approximately \$27,700 per person in the region or \$4.5 million for each of the 50 current residents of the island. See http://en.wikipedia.org/wiki/Gravina_Island_Bridge (last visited October 6, 2006).

Article 3 infrastructure. Yet even the costs of upkeep may not be justified by the minimal usefulness of this infrastructure.

III. THE SUPERFLUOUSNESS OF MOST RULES IN THE LAW OF NOTES

Perhaps the statements made in Part I of this article about the paucity of notes governed by UCC Article 3 are exaggerated, and there is no shortage of notes to which Article 3 of the UCC may be applied. If that is the case, there are still many reasons to be dissatisfied with the law of notes as set forth in Article 3. One reason is quite basic—the law of notes, set out in such detail in the sixty-eight sections of Article 3, is largely superfluous.

How can this be? Let us consider the functions fulfilled by the rules in UCC Article 3. For the most part, the law of notes as embodied in UCC Article 3 generally consists of three types of rules. First, several rules set out the obligations of various parties to negotiable instruments. In the case of notes, the relevant parties are makers¹⁹ and indorsers,²⁰ as well as accommodation parties.²¹ Second, another group of provisions provides rules about transfer of negotiable instruments and the consequences of transfer. These include not only the basic transfer rules in Section 3-203, but also rules concerning warranties and the like.²² The third set of rules is at the heart of negotiable instruments law—these are the rules governing holder in due course status and its consequences. The holder in due course rules can themselves be divided into three categories. The first category of holder in due course rules determines who qualifies as a holder in due course. These preconditions for achieving the status of a holder in due course are discussed in Part VIII below. The second category of holder in due course rules provides the freedom from personal defenses of those who qualify as holders in due course.²³ The third category of holder in due course rules provides good title to negotiable instruments to those who qualify as holders in due course of the instruments.²⁴

All of the rules mentioned in the previous paragraph are important rules. Let us go further and assume, at least for the time being, that they are good rules. Nonetheless, for the most part, they are unnecessary rules.

They are unnecessary because, with the exception of the good title rules for holders in due course, they could all be created by contract whether or not

¹⁹ See U.C.C. §§ 3-103(a)(7), 3-412 (2003). (The latter section applies because a maker of a note also qualifies as an “issuer.” See U.C.C. § 3-105(c) (2003)).

²⁰ See *id.* §§ 3-204(b), 3-415.

²¹ See *id.* § 3-419.

²² See *id.* §§ 3-416, 3-417.

²³ See *id.* § 3-305(b).

²⁴ See *id.* § 3-306.

the document evidencing the undertaking to pay qualifies as a note governed by Article 3 of the UCC. Thus, while the rules may be beneficial, they do not bring about results that could not be brought about, almost as simply, merely by careful drafting of the underlying contract.

Certainly, the obligation of the maker of a note—to pay the amount of the obligation in accordance with its terms to the person to whom the obligation is then owed²⁵—is quintessentially a contractual obligation, no different than an obligation that can be created by express language in the contractual document. While express language, of course, adds words to an agreement, today's typical promissory note is hardly a terse affair in any event, so it can hardly be said that a default rule that results in the maker's obligation being an implicit term of a payment undertaking that qualifies as a note represents a major advantage over the necessity of stating the obligation expressly in an undertaking that does not qualify as a note.

Similarly, the obligation of an indorser can be stated explicitly in the body of an undertaking to pay money. Once again, this would require additional words, but these would be words of a boilerplate variety that would not significantly lengthen the document. As with the maker's obligation, the fact that the indorser's obligation is an implicit default rule in the case of a note would not seem to provide a serious advantage to using negotiable notes rather than other forms of payment undertaking inasmuch as it is easy to express that obligation with explicit language.

It would seem that the second set of default rules for notes—those that govern transfer of the undertaking—could also be replicated by contractual language in the absence of statutorily implied rules. A provision in the agreement creating the undertaking to pay money could state expressly the effect of transfer of the obligee's rights on the obligations of the obligors (such as makers and indorsers) of the undertaking, and the transferee of the undertaking can certainly insist that the transferor provide warranties such as those that are part of the Article 3 rules structure for notes. Thus, it would appear that the transfer rules of UCC Article 3 do not provide any significant benefits for notes that are not available for contractual obligations generally.

It is commonplace that the holder in due course doctrine is the heart of the law governing negotiable instruments and, thus, notes. Accordingly, it would seem that the holder in due course rules for notes would differ from the other Article 3 rules discussed above in that they could not be created by contract if Article 3 did not mandate them. Yet, even this statement is not completely true. Rather, one of the two major functions of the holder in due course doctrine can be achieved by contract independently of the statutory language. I refer, of course, to the freedom from personal defenses that is accorded to holders in due course by UCC Section 3-305(b). Such freedom

²⁵ U.C.C. § 3-412 (2003).

from defenses for assignees is frequently provided for in undertakings to pay money that are not negotiable instruments. Indeed, such clauses are blessed by the UCC for undertakings other than instruments. UCC Section 9-403(b) provides:

Except as otherwise provided in this section, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment:

(1) for value;

(2) in good faith;

(3) without notice of a claim of a property or possessory right to the property assigned; and

(4) without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under Section 3-305(a).²⁶

To make sure that these contractual freedom-from-defense clauses do not have greater reach than the freedom accorded to holders in due course in Article 3, UCC Section 9-403(c) goes on to provide: “[s]ubsection (b) does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under Section 3-305(b).”²⁷

The common law can be interpreted to reach the same result as well. Illustration 10 to Restatement (Second) Contracts § 336 provides:

A sells and delivers goods to B, and B agrees that in the event of an assignment to C, B will pay the price to C without asserting any defense or claim based on breach of warranty by A. A assigns his rights under the contract to C, who takes in good faith and without notice of any defense or claim. In the absence of statute or administrative rule, B is barred from asserting against C a defense or claim based on breach of warranty by A.²⁸

The result of the Article 9 provision and the Restatement rule is to allow the creation, by contract, in an undertaking that does not qualify as a note, the most famous attribute of negotiability. Once again, the law of notes has added nothing to the parties’ rights and duties other than brevity and simplicity of drafting.

The other attribute of holder in due course status with respect to notes—the good title afforded holders in due course²⁹—would appear to be an

²⁶ *Id.* § 9-403(b).

²⁷ *Id.* § 9-403(c).

²⁸ RESTATEMENT (SECOND) OF CONTRACTS § 336 cmt. f, illus. 10 (1979).

²⁹ UCC § 3-306 provides, in relevant part:

attribute that cannot be created by contract. This is because, unlike the freedom-from-personal-defenses feature of holder in due course status, the good title rule does not affect only parties to the payment undertaking (such as makers and indorsers) but, rather, affects all potential claimants to the undertaking; by their nature, such claimants are not typically parties to the undertaking. Competing claimants for a payment right who are not parties to it cannot be said to have had their property rights cut off by contracts to which they were not parties.

What is the bottom line here? Only one attribute of notes—the ability of holders in due course to get good title to them—cannot be created by simple contract in undertakings that do not qualify as notes. While the Article 3 provisions that confer these attributes have some efficiency advantages in that they need not be the subject of separate bargaining, those advantages would appear to be slight in an era in which contracts creating payment undertakings are often exceedingly detailed in any event. Thus, in the context of notes, the Article 3 rules matrix would appear to add very little value beyond what could be achieved by contract, other than the good title afforded to a holder in due course.

IV. THE LACK OF RELATIONSHIP BETWEEN THE TECHNICAL REQUIREMENTS FOR NEGOTIABILITY OF NOTES AND THE TRANSACTIONAL RULES OF ARTICLE 3

Perhaps I have been uncharitable toward UCC Article 3. While, even without the benefit of the statute, most of the benefits of Article 3 can be achieved by contract for a payment undertaking, it is certainly possible that the efficiency advantages of having those rules being automatically included as default rules rather than having to draft language effectuating those benefits and obtain agreement to them by the parties (and accepted by potential transferees) are more substantial than I think they are.

If that is the case, however, one can legitimately ask whether there is any sensible relationship between those rules and the form requirements in Article 3 for negotiability. After all, a payment undertaking that does not fulfill those form requirements is not governed by UCC Article 3 and, thus,

A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. *A person having rights of a holder in due course takes free of the claim to the instrument.*

U.C.C. § 3-306 (2003) (emphasis added). For simplicity, this article frequently abbreviates this right accorded to a holder in due course by section 3-306 as the “good title” right.

does not get the benefit of those rules.³⁰ Why don't the transactional rules governing notes apply to payment undertakings that do not fulfill the technical requirements of negotiability? Is there something about a non-negotiable undertaking that states "pay to Jane Doe" that justifies a different legal effect for an indorsement on the undertaking than on an otherwise identical undertaking that is negotiable because it instead states "pay to the order of Jane Doe"? Is there something about a non-negotiable undertaking with a due date triggered by an external event (say, the issuance of a certificate of occupancy for a building) that justifies the lack of transfer warranties that would be present if the undertaking were otherwise identical except that it is negotiable because the due date qualifies as a "definite time" under UCC Section 3-104?

I suggest that the technical requirements of negotiability bear no discernible relation to the transactional rules in UCC Article 3. Rather, they are just a hurdle to be satisfied in order for the transactional rules of the Article to be default rules rather than rules that must be bargained for. (Or, to phrase this in reverse, if the hurdles are satisfied, the parties have the burden of agreeing upon and drafting any deviation from those default rules.³¹)

By way of contrast, consider the most important transactional default rules of all—those that make it possible for a holder of a note to transfer it without consent of the maker and any other obligor.³² If Article 3 does not apply to a payment undertaking because the undertaking does not qualify as a negotiable instrument, though, those rules do not apply. Does this mean that there is a commercial policy in favor of easy transferability of undertakings that qualify as notes but against easy transferability of undertakings that do not qualify as notes? Of course not. Rather, both common law and statute

³⁰ It should be noted that the 1962 text of Article 3 was not so strict in this regard. Former UCC § 3-805 provided: "This Article applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this Article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument." U.C.C. § 3-805 (1962). Thus, if the only reason that a payment undertaking did not qualify as a negotiable instrument was the lack of "magic words" (i.e., bearer or order), the transactional rules of Article 3—other than the holder in due course rules—still applied. This is still the rule in New York and South Carolina, which have not enacted the 1990 revised text of Article 3 or its 2002 amendments.

³¹ See, e.g., the rules requiring presentment and notice of dishonor in Part 5 of Article 3. As provided in UCC §§ 3-504(a)(iii) and 3-504(b)(i), the terms of the note may dispense with those requirements. U.C.C. §§ 3-504(a)(iii), 3-504(b)(i) (2003).

³² The obligations of an issuer and an indorser are owed to a person entitled to enforce the instrument. See U.C.C. §§ 3-412, 3-415(a) (2003). By virtue of Sections 3-203(b) and 3-301, a transferee is automatically a person entitled to enforce the instrument, even if he or she does not qualify as a holder (assuming, of course, that the transferor had the purpose of giving the transferee the right to enforce the instrument; see U.C.C. § 3-203(a) (2003)).

have developed transferability rules that parallel those in UCC Article 3. Under the common law of contracts, a monetary claim already earned by performance (as in the case of payment undertakings for which there is no defense) can be assigned in the absence of a contractual restriction to the contrary.³³ Moreover, even a contract term prohibiting assignment of rights under a contract does not prohibit such an assignment of an earned right to payment unless the contrary intention is manifested.³⁴ In addition, UCC Sections 9-406 and 9-408 sweep away many contractual and legal restrictions on the assignability of payment obligations.³⁵ To be sure, in the case of payment intangibles and promissory notes, UCC Section 9-408 gives some effect to restrictions on transfer contained in a payment undertaking, but the Article 9 rules governing a negotiable note (which, by virtue of the requirements of UCC Section 3-104 cannot contain a restriction on transfer) and a non-negotiable "promissory note" that is silent as to transfer are exactly the same. Thus, UCC Section 9-408 does not change the default rule so much as it enables the parties to bargain for a different answer.

Article 3 of the UCC erects a series of form technicalities that serve as the gatekeepers to the applicability of its transactional rules. Yet, the technicalities seem to bear little or no relation to those rules or their desirability. Rather, as is the case for much of the law governing notes, the technicalities seem to be remnants of a bygone era rather than purposive choices related to their effects.

V. ARTICLE 3'S CODIFICATION OF COMMON LAW DOCTRINES LACKS THE RICHNESS AND FLEXIBILITY OF THE COMMON LAW

While much of the law of notes involves the application of special rules to payment undertakings that meet the technical requirements of negotiability (even though, as I have suggested in Part IV above, in many cases there is no discernible relation between those technical requirements and any justification for the special rule), this is not always the case. Indeed, in a small but significant portion of the law of notes, the opposite phenomenon is present.

In these cases, negotiable instrument law, as enacted in Article 3 of the UCC, is nothing more than a codification of the common law. As a codification, though, the Article 3 versions of the common law doctrines at

³³ See RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1979).

³⁴ See *id.* § 322(2).

³⁵ UCC Article 9 not only applies to transactions in which personal property secures an obligation but also to most sales of accounts, chattel paper, payment intangibles, and promissory notes. See U.C.C. § 9-109(a)(3) (2003).

issue may lack the flexibility of the common law to deal with new or unforeseen circumstances.

A small example is provided by the law of consideration. The common law has, over the years, developed a substantial body of law devoted to the issue of consideration and the ability of an obligor to avoid liability on the basis of lack of consideration or failure of consideration.³⁶ Article 3 reduces this body of work to a paragraph. UCC Section 3-303(b) provides:

“Consideration” means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a), the instrument is also issued for consideration.³⁷

From this paragraph we learn (i) Article 3’s definition of consideration, (ii) that lack of consideration is a defense, and (iii) failure of consideration is a defense.³⁸ Does Article 3 intend that this paragraph contains all of the wisdom about consideration that is applicable to notes, or that the nuances of the common law doctrines apply as well? The text of Article 3 provides no clues. One could argue that UCC Section 1-103 leads to the conclusion that common law concepts of consideration are available to supplement the rules in UCC Section 3-303(b).³⁹ If that is the case, though, why bother to put consideration in Article 3 at all? Why not just leave it entirely to the common law as incorporated through UCC Section 1-103?

A larger example is provided by the suretyship principles that are codified in UCC Article 3. The journey taken by these sections from the originally-enacted version of Article 3 through the 1990 revised Article 3 and the 2002 amendments is interesting and instructive.

In the 1962 text of UCC Article 3, suretyship rules were codified in UCC Sections 3-415(5) and 3-606. The former contained the rules establishing the rights of the surety (known in Article 3 as an “accommodation party”) against the principal obligor (known in Article 3 as the “accommodated

³⁶ See generally RESTATEMENT (SECOND) OF CONTRACTS Ch. 4 (1979).

³⁷ U.C.C. § 3-303(b) (2003).

³⁸ Of course, these defenses are not available against a holder in due course. See U.C.C. § 3-305 (2003).

³⁹ UCC § 1-103(b) provides: “Unless displaced by the particular provisions of [the UCC], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.” U.C.C. § 1-103(b) (2003).

party"); the latter indicated the special defenses of the surety to its obligation on the instrument.

Former UCC Section 3-415(5) provided that "[a]n accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party."⁴⁰

Former UCC Section 3-606 provided:

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with a right of recourse the holder preserves

(a) all his rights against such party as of the time when the instrument was originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) all rights of such party to recourse against others.⁴¹

The right of recourse provided in former UCC Section 3-415(5) was generally consistent with the surety's common law right of subrogation as it existed at that time,⁴² but omitted any mention of the surety's rights of reimbursement⁴³ and exoneration.⁴⁴ The suretyship defenses provided in former UCC Section 3-606 were essentially consistent with traditional

⁴⁰ U.C.C. § 3-415(5) (1962).

⁴¹ U.C.C. § 3-606 (1962).

⁴² See RESTATEMENT OF SECURITY § 141 (1941). References to the *Restatement of Security* in this and subsequent footnotes are intended to reflect the state of the law of suretyship and guaranty as it existed when Article 3 was initially drafted. The *Restatement of Security* has since been superseded by *Restatement (Third) Suretyship and Guaranty* (1996). See *infra* text accompanying notes 49-50.

⁴³ See RESTATEMENT OF SECURITY § 104 (1941).

⁴⁴ See *id.* § 112.

common law notions of suretyship and guaranty but, by their relatively terse nature, were not as nuanced as the common law doctrines.⁴⁵

As is the case with the consideration rules described above, the choice of which aspects of the common law rules of suretyship and guaranty to state in the text of former Article 3 and which to leave to the uncertainties of possible incorporation through UCC Section 1-103 seems a bit arbitrary. For example, since the common law right of subrogation did not typically arise unless and until the surety fulfills the entire obligation of the principal obligor⁴⁶ while the right of reimbursement arose even for partial payments,⁴⁷ most sureties would consider the absence of an explicitly stated right of reimbursement to be troubling.

Against this background of incomplete statements of common law principles, as well as some modernization of the common law, the 1990 text of UCC Article 3 made substantial changes in the principles of suretyship law as applied to notes. As I have noted elsewhere,⁴⁸ these changes, incorporated in revised UCC Sections 3-419 and 3-605, represented both a modernization of suretyship rules and a partial misunderstanding of their operation in typical commercial contexts. Partially as a result of analyses of that sort, the Permanent Editorial Board (PEB) for the UCC promulgated a PEB Commentary which took some of the rough edges off sections 3-419 and 3-605.⁴⁹

After the promulgation of the PEB Commentary, the American Law Institute published the *Restatement (Third) of Suretyship and Guaranty*.⁵⁰ This Restatement was influenced in part by the innovations in the 1990 text of UCC Article 3, but avoided some of the pitfalls in that text. When the Drafting Committee for the 2002 revisions to UCC Article 3 was constituted, this Restatement was viewed with approval, and a decision was made that the suretyship rules in Article 3 should be completely consistent with the rules in the new Restatement. The result of that decision was the 2002 text of UCC Sections 3-419 and 3-605. UCC Section 3-419 now includes not only subrogation, but also reimbursement (added in the 1990 text) and exoneration. Thus, it provides a terse summary of the rights of a secondary obligor to be made or kept whole. UCC Section 3-605, as it appears in its 2002 manifestation, is quite massive. While it is a very well-drafted

⁴⁵ See, e.g., *id.* §§ 122, 127–29, 132.

⁴⁶ See *id.* § 141.

⁴⁷ See *id.* § 104.

⁴⁸ See Neil B. Cohen, *Suretyship Principles in the New Article 3: Clarifications and Substantive Changes*, 42 ALA. L. REV. 595, 598–600 (1991).

⁴⁹ See Permanent Editorial Bd. for the UCC, PEB Commentary No. 11 (1994, rev. 2002). The author of this Article was one of the drafters of that PEB Commentary.

⁵⁰ The author of this Article was the Reporter for that Restatement.

incorporation of the key rules from the Restatement, this effort took 1195 words of text and 5349 words in the Official Comment for its accomplishment, making it the longest substantive section in the entire UCC. Nonetheless, by its nature that section can incorporate only a fraction of the detail appearing in the Restatement, which is a volume of several hundred pages. At least this version of Article 3 does not leave us in doubt as to whether its suretyship rules are intended to be a complete and exclusive statement of the principles applicable to notes. Official Comment 1 to revised UCC Section 3-605 provides:

This section contains rules that are applicable when a secondary obligor (as defined in Section 3-103(a)(17)) is a party to an instrument. These rules essentially parallel modern interpretations of the law of suretyship and guaranty that apply when a secondary obligor is not a party to an instrument. See generally *Restatement of the Law, Third, Suretyship and Guaranty* (1996). *Of course, the rules in this section do not resolve all possible issues concerning the rights and duties of the parties. In the event that a situation is presented that is not resolved by this section (or the other related sections of this Article), the resolution may be provided by the general law of suretyship because, pursuant to Section 1-103, that law is applicable unless displaced by provisions of this Act.*⁵¹

While the 2002 revisions to the suretyship provisions in UCC Article 3 are both successful and represent an improvement over their predecessors, one still must consider the advisability of producing an incomplete paraphrase of a complex body of law, risking judicial inflexibility when a matter apparently falls within the purview of the statutory text, rather than simply referring the entire matter to the common law (with which total consistency is the goal) via Section 1-103.

VI. THE LIMITED USEFULNESS OF THE FREEDOM FROM DEFENSES ACCORDED TO A HOLDER IN DUE COURSE

While most of the provisions of UCC Article 3 work together with the goal of creating the structure of a smoothly flowing system, the conventional wisdom is that the law of notes revolves around just a few sections in Article 3—those that contain the rules relating to holders in due course.⁵² For the most, this core of Article 3 is contained in just three sections—UCC Sections 3-302, 3-305, and 3-306.

⁵¹ U.C.C. § 3-605 off. cmt. 1 (2003) (emphasis added).

⁵² See the interesting discussion of this point in James Steven Rogers, *The Myth of Negotiability*, 31 B.C. L. REV. 265, 266–67 (1990).

The first of those sections contains criteria for holder in due course status.⁵³ The other two sections provide the benefits of holder in due course status. While the benefit of holder in due course status afforded by UCC Section 3-306 (good title to the instrument) may have greater commercial utility than is generally appreciated, it is the benefit afforded by UCC Section 3-305—freedom from personal defenses⁵⁴—that gets all the attention.

Yet, the freedom from personal defenses that is the hallmark of holder in due course status is of remarkably limited utility in today's economy. First, as noted above, there are simply not many notes to which the holder in due course doctrine even applies.⁵⁵ The number of payment undertakings that qualify as negotiable instruments is surprisingly low and, while consumer notes that contain the FTC holder in due course language are negotiable instruments, those instruments cannot have holders in due course.⁵⁶

Even in situations to which the holder in due course doctrine applies, however, the effect of the freedom from defenses strand of that doctrine may be less than is generally appreciated. Why? Because, in all likelihood, there are not many defenses from which to be free.

For example, consider consumer obligations not covered by the FTC holder in due course regulations.⁵⁷ These are primarily payment undertakings issued in exchange for home mortgage loans or car loans from lenders unrelated to the seller of the car. In each case, the payee almost certainly advanced the funds that are covered by the payment undertaking. As a result, even if enforcement of the note were sought by someone who did not qualify as a holder in due course, the maker would have no defenses. After all, the payment undertaking was entered into to repay the funds advanced and the funds were advanced. There would be no defense that could be raised with respect to the advance, and any claims that the maker might have against the person from whom it bought the house or car would not be defenses against the lender in any event. As a result, the cut-off of personal defenses would largely be irrelevant.⁵⁸

For the most part, it would appear that there are similarly few defenses available for most commercial payment undertakings. First, as demonstrated

⁵³ See discussion *infra* Part VIII.

⁵⁴ See U.C.C. § 3-305(b) (2003).

⁵⁵ See *supra* text accompanying notes 7–16.

⁵⁶ See U.C.C. § 3-106(d) (2003).

⁵⁷ See *supra* text accompanying notes 11–16.

⁵⁸ Of course, there are some defenses that might be available to a maker even if the undertaking was to repay a loan that was actually made. For example, the maker may have paid the note or otherwise have been discharged from it before the note somehow made its way to a holder in due course. Such scenarios, though, are more common in law school exams than in actual transactions.

by Mann, even in the case of notes as to which the holder in due course doctrine is applicable, very few notes are transferred to transferees who would qualify as holders in due course.⁵⁹ Second, and perhaps more important, it would seem that, as in the case with consumer undertakings, most commercial notes are issued in exchange for loans made and, thus, there are not likely to be defenses that would have been available to the maker in any event. While there is certainly a large market for goods and services sold on commercial credit, it is my impression that this credit is extended on the basis of open accounts or chattel paper that does not include a negotiable instrument much more often than on the basis of a negotiable instrument (whether or not included in chattel paper).

If, as appears to be the case, there are very few notes as to which obligors could successfully raise defenses, the importance of a doctrine that cuts off those defenses in some circumstances would appear to be quite limited. Indeed, a search for cases citing UCC Section 3-305 (the section in Article 3 that cuts off personal defenses as against a holder in due course) since January 1, 2005 reveals no cases.

Of course, my impressions as to the lack of circumstances in which there are defenses to notes may be incorrect and the lack of reported cases may fail to give warning of a submerged iceberg. If that is the case, and a significant number of defenses are cut off by holders in due course, the question is raised as to whether this doctrine represents good social policy. A generation ago, Albert Rosenthal argued that negotiability is a doctrine whose time has passed.⁶⁰ In addition, Jim Rogers has questioned the historical pedigree of the doctrine as one that cuts off defenses.⁶¹ While the freedom from defenses doctrine certainly can work to increase the marketability of notes, the cost to any makers with otherwise effective defenses that are cut off by the rule is quite large. At the very least, this counsels against a legal doctrine that brings about such a dramatic result even in the absence of explicit agreement that defenses would not be available against transferees. While UCC Section 9-403 blesses contractual provisions that bring about a cut-off of defenses, those provisions at least are explicit, and put the obligor on some notice that it may have to pay an assignee even in circumstances in which a defense could be raised against the initial obligee.

⁵⁹ See Mann, *supra* note 7, at 998–1004.

⁶⁰ See Albert J. Rosenthal, *Negotiability—Who Needs It?*, 71 COLUM. L. REV. 375, 401–02 (1971).

⁶¹ See Rogers, *supra* note 52, at 266–67.

VII. THE QUESTIONABLE RELATIONSHIP BETWEEN THE POLICIES FAVORING GOOD TITLE FOR AN ASSIGNEE OF A NOTE AND THE TECHNICAL REQUIREMENTS OF NEGOTIABILITY?

One aspect of the law of notes that appears to have significant commercial importance is the freedom from competing property claims that is enjoyed by a holder in due course of a note.⁶² Because this aspect of the holder in due course doctrine can work to cut off the rights of third parties who are not parties to the note (or to any other agreement with the holder in due course), this result cannot be achieved by contract.⁶³

This good title strand contrasts with the freedom from defenses strand of the holder in due course doctrine in two ways. First, as noted earlier, the results of the latter strand can be created by contract even in the absence of a statute that brings about the result automatically. Second, this good title strand, unlike the freedom from defenses strand, appears to have significant commercial utility. Securitization and structured finance transactions involving notes require an entity that has unquestioned ownership of the notes, and factors and similar high-volume buyers of notes are similarly benefited by freedom from ownership claims, especially for notes that may have passed through a series of transferees.

Given the utility of the good title strand of the holder in due course doctrine, one might wonder why it is featured in my list of problematic aspects of the law of notes. The reason lies not in the utility of the doctrine, but in its operation. There are two aspects of the good title strand of the holder in due course doctrine as applied to notes that are worthy of question.

First, it is hardly clear why, for a payment undertaking to be eligible for the benefits of this good title doctrine, the technical requirements for negotiability of the undertaking must be met. What is it, for example, about an undertaking to pay a fluctuating sum, or an undertaking that contains a promise other than the payment of money, that makes the undertaking unworthy of eligibility for the good title doctrine?⁶⁴ There does not seem to be any discernible connection between the policies in favor of protecting a good faith purchaser against property claims of others and fulfillment of these criteria, and there does not seem to be any policy reason to deny protection to such a purchaser simply because one of these criteria is not fulfilled.

⁶² See U.C.C. § 3-306 (2003).

⁶³ See *supra* text accompanying note 29.

⁶⁴ An undertaking to pay a fluctuating sum cannot be a negotiable instrument because it fails to fulfill the criterion that the undertaking be to pay a fixed amount of money. See U.C.C. § 3-104(a) (2003) (The addition of another promise violates UCC § 3-104(a)(3)).

Second, it is not clear why the good title strand of the law of notes differs from other good title doctrines in commercial law. Compare, for example, the good title doctrine of notes with the analogous good title doctrine for negotiable documents of title. Under the latter doctrine, a holder to whom a negotiable document of title has been "duly negotiated" acquires title to the document and the goods it represents.⁶⁵

A document is duly negotiated if it is negotiated . . . to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation.⁶⁶

This good title doctrine differs from the good title strand of the holder in due course doctrine for notes in several ways. For example, the rule for documents of title is limited to situations in which the negotiation is in the regular course of business or financing, a requirement that is not present for the negotiation of notes.⁶⁷ Also, in order to qualify for the good title protection, the transferee of a negotiable document of title may not receive the document as payment of a monetary obligation. This is in contradistinction to the parallel doctrine for notes, which defines "value" to include a payment of an antecedent debt. Yet, it is hardly obvious why these

⁶⁵ See U.C.C. § 7-502(a) (2003).

⁶⁶ See *id.* § 7-501(a)(5).

⁶⁷ As explained in the Official Comments to § 7-501:

There are two aspects to the usual and normal course of mercantile dealings, namely, the person making the transfer and the nature of the transaction itself. The first question which arises is: Is the transferor a person with whom it is reasonable to deal as having full powers? In regard to documents of title the only holder whose possession or control appears, commercially, to be in order is almost invariably a person in the trade. No commercial purpose is served by allowing a tramp or a professor to "duly negotiate" an order bill of lading for hides or cotton not their own, and since such a transfer is obviously not in the regular course of business, it is excluded from the scope of the protection

The second question posed by the "regular course" qualification is: Is the transaction one which is normally proper to pass full rights without inquiry, even though the transferor itself may not have such rights to pass, and even though the transferor may be acting in breach of duty? In raising this question the "regular course" criterion has the further advantage of limiting, the effective wrongful disposition to transactions whose protection will really further trade. Obviously, the snapping up of goods for quick resale at a price suspiciously below the market deserves no protection as a matter of policy: it is also clearly outside the range of regular course.

policies that prevent the cut-off of title claims for negotiable documents and the goods they represent do not also apply to notes.

VIII. THE MINDLESS LINKAGE OF THE CRITERIA FOR A TRANSFEREE'S FREEDOM FROM DEFENSES WITH THE CRITERIA FOR A TRANSFEREE'S GOOD TITLE

A person who has the rights of a holder in due course is doubly blessed by the law of notes. That person owns the note free of all competing claims to it⁶⁸ and, in enforcing the note, is not subject to personal defenses.⁶⁹ These two advantages of holder in due course status are quite different—the first is a property right and the second is a contract right.

Not surprisingly, the criteria for holder in due course status reflect the policy justifications for both of those rights. For example, UCC Section 3-302 provides that a holder in due course must (i) be a holder (ii) of an instrument that does not look fishy⁷⁰ who (iii) took the instrument for value⁷¹ and in good faith.⁷² Of the remaining criteria, most effectuate policies relating to freedom from defenses, while one effectuates a policy related to the freedom from competing claims.

UCC Section 3-302(a)(2)(vi) is the broadest of the remaining criteria. It provides that, to qualify as a holder in due course, a holder must take the instrument “without notice that any party has a defense or claim in recoupment described in Section 3-305(a).”⁷³ (Section 3-305(a) sets out the “real” defenses of an obligor,⁷⁴ the obligor’s “personal” defenses,⁷⁵ and the obligor’s claims in recoupment that can be utilized to lessen or eliminate liability on the instrument.⁷⁶)

UCC Sections 3-302(a)(2)(iii) and 3-302(a)(2)(iv) go beyond requiring that the holder be free from notice of defenses to require that, to qualify as a holder in due course, the holder take the instrument without notice of certain facts that might suggest that the maker or another obligor has a defense. UCC

⁶⁸ See U.C.C. § 3-306 (2003).

⁶⁹ See *id.* § 3-305(b).

⁷⁰ More formally, UCC § 3-302(a)(1) requires that “the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity.” U.C.C. § 3-302(a)(1) (2003).

⁷¹ *Id.* § 3-302(a)(2)(i).

⁷² *Id.* § 3-302(a)(2)(ii).

⁷³ *Id.* § 3-302(a)(2)(vi).

⁷⁴ *Id.* § 3-305(a)(1).

⁷⁵ *Id.* § 3-305(a)(2).

⁷⁶ U.C.C. § 3-305(a)(3) (2003).

Section 3-302(a)(2)(iii) provides that, to qualify as a holder in due course, the holder must take the instrument "without notice that [it] is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series." This criterion clearly relates to freedom from defenses, because a person who takes the instrument in the circumstances described would have reason to believe that the issuer of the instrument might be resisting payment because it believes that it has a defense.

Similarly, UCC Section 3-302(a)(2)(iv) provides that, to qualify as a holder in due course, the holder must take the instrument "without notice that [it] contains an unauthorized signature or has been altered."⁷⁷ Again, this criterion clearly relates to freedom from defenses, because a holder that had notice of the facts described would have notice that the apparent issuer would have a defense if sued for the apparent amount of the instrument.

Finally, UCC Section 3-302(a)(2)(v) contains a criterion relating to freedom from competing claims. That section provides that, to qualify as a holder in due course, the holder must take the instrument "without notice of any claim to the instrument."⁷⁸ It is clear that the policy here is not to award good title over competing claimants to a transferee who took the instrument with some idea that competing claims existed.

All of the criteria described in the preceding paragraphs would appear to make a great deal of sense. What, then, is the problem?

The problem is that the two advantages of holder in due course status, and the criteria justifying those two advantages, are yoked together. A holder cannot qualify for either advantage unless it qualifies for both.

This makes very little sense. There appears to be no good reason that a holder who takes a note for value, in good faith, and without notice of any claims to the instrument should fail to get good title and, thus, be subject to an unknown claim merely because the note was overdue when it was acquired.⁷⁹ There is nothing about the fact that a transferee has notice that a note is overdue that affects ownership of the note or that should give a potential acquirer of the note reason to believe that all is not right on the ownership front. Why doesn't the law provide that the transferee gets good title to the note (since it had no notice with respect to title issues) while still being subject to any defenses (since it did have notice of facts that could suggest the existence of defenses)? Similarly, there is nothing about the fact that a transferee of a note has notice that there might be an adverse ownership claim to it that gives the transferee notice of any possible defenses

⁷⁷ *Id.* § 3-302(a)(2).

⁷⁸ *Id.*

⁷⁹ A holder who takes a note with notice that it is overdue cannot be a holder in due course. *See* U.C.C. § 3-302(a)(2)(iii) (2003).

on the part of an obligor. Why can't the transferee enforce the note free of defenses, especially if the potential adverse claim turns out not to be valid? After all, the transferee had notice of a potential claim of ownership of the note, but it did not have notice that any obligor had defenses that could be raised to the obligation to pay the note. Does the acquirer's decision to take the risk associated with uncertain ownership necessarily mandate that it also take the risk of unknown defenses?

A more sensible way of establishing conditions for a note transferee to get good title to a note or to be free of defenses to it would be to separate the criteria for freedom from adverse claims from the criteria for freedom from defenses.⁸⁰ This would avoid the unjustified situation of the failure to qualify for one type of freedom also disqualifying the holder from the other type of freedom.

IX. THE ANACHRONISTIC MERGER DOCTRINE

Another principle that is at the core of the law of notes is the so-called "merger doctrine." That doctrine is primarily codified in UCC Section 3-310, which provides that when a note is taken for an obligation, two consequences follow. First, the obligation is suspended to the same extent that it would be discharged if the amount of the note were paid in money.⁸¹ Second, payment of the note discharges the obligation to the extent of the payment.⁸²

Grant Gilmore memorably described the merger doctrine as follows:

In putting together their law of negotiable instruments, the courts assumed that the new mercantile currency was a good thing whose use should be encouraged. Two quite simple ideas became the foundation pieces for the whole structure. One was the good faith purchase idea. . . . The other idea which, the first time you run into it, sounds like nonsense—the legal mind at its worst—was even more basic to the structure and indeed was what gave the completed edifice its pure and almost unearthly beauty. That was the idea that the piece of paper on which the bill was written or printed should be treated as if it—the piece of paper—was itself the claim or debt which it evidenced. This idea came to be known as the doctrine of merger—the debt was merged into the instrument. At one stroke it drastically simplified the law of negotiable instruments, to the benefit of both purchasers and the people required to pay the instruments. Under merger theory the only way of transferring the debt represented by the bill

⁸⁰ While today we tend to think of these two attributes of holder in due course status as conjoined twins, their historical development was quite separate, with the good title attribute developing well in advance of freedom from defenses. See Rosenthal, *supra* note 60, at 377–78.

⁸¹ See U.C.C. § 3-310(b) (2003).

⁸² See *id.* § 3-310(b)(2).

was by physical delivery of the bill itself to the transferee. . . . Only the holder—the person physically in possession of the bill under a proper chain of endorsements—was entitled to demand payment of the bill from the party required to pay it; only payment to such a holder discharged the bill as well as the underlying obligation.⁸³

The merger doctrine may be a wonderful doctrine whose time has come and gone. It presupposes a world in which debts are evidenced by pieces of paper that move from hand to hand in commerce. This is anachronistic in two ways. First, signed pieces of paper are highly inefficient in a world of electronic commerce. Second, requiring the piece of paper to move along with changes in its ownership (and ownership of the underlying claim) is unrealistic in a world of participations, mortgage servicers, sales of fractional interests in claims, and securitization and structured finance.

The first anachronism might possibly be addressed by allowing something that qualifies as the electronic equivalent of a writing, and that otherwise fulfilled the criteria for negotiable instrument status, to be considered a negotiable instrument. Indeed, the UCC has already begun to move in this direction in the related areas of electronic chattel paper and electronic documents of title.⁸⁴ Yet, the Drafting Committee that recently revised UCC Articles 3 and 4 was conducting its deliberations after the 1998 revision of Article 9 that added electronic chattel paper and contemporaneously with the Drafting Committee for revised Article 7 that added the concept of electronic documents of title; nonetheless, it showed no enthusiasm for a parallel approach that would create electronic negotiable instruments.

The second anachronism is, in a sense, emblematic of the modern-day law of notes. The law is designed for a day in which pieces of paper that were not money passed in commerce as sort of a quasi-currency whose value depended on the credit-worthiness of their issuers. That day is long gone, but the law of notes has not noticed.

Perhaps it is time for a modified merger doctrine. Such a doctrine would allow a contractual obligation to pay money to be embodied in a “clean” legal instrument (i) that is somewhat independent of the facts that give rise to it and (ii) satisfaction of which would also satisfy the underlying contractual obligation. This would embrace the policies supporting the merger doctrine while disentangling them from the world of possessible documents.

⁸³ Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 448–50 (1979).

⁸⁴ See U.C.C. §§ 9-102(a)(31), 1-201(a)(15) (2003).

X. CONCLUSION

The problematic aspects of the law of notes that are surveyed in this Article reflect a broader problem—the law consists of a collection of old doctrines of questionable applicability and doubtful relevance. To the extent that the law is simply inapplicable to most transactions (as explored in Part I above), the problem may not seem to have serious adverse consequences (except to law students who devote time to mastering the arcana of statute). Yet, the existence of an extensive body of law that appears to apply to matters to which it does not can lead to no good end. To the extent that doctrines of questionable commercial sensibility are actually applied to modern-day disputes, though, the cost is obviously much greater. In either case, the sorry state of the law of notes is a commercial calamity in the making. This is not to say that we do not need a body of law to govern undertakings to pay money; we do need such a body of law, but the current law of notes does not fit the bill.

